

STATE OF MICHIGAN
COURT OF APPEALS

BMJ ENGINEERS & SURVEYORS, INC.,

Plaintiff/Counterdefendant-
Appellee,

v

NATURE'S WAY PROPERTIES, LLC.,

Defendant/Counterdefendant/Cross
plaintiff/Crossdefendant-Cross-
Appellant,

and

TELTOW CONTRACTING, INC.,

Defendant/Counterplaintiff/Cross
plaintiff,

and

FIRST STATE BANK OF EAST DETROIT,

Defendant/Counterdefendant/Cross
defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

May 31, 2007

No. 272835

St. Clair Circuit Court

LC No. 05-002132-CH

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

In this legal dispute arising from a residential property development, First State Bank of East Detroit appeals as of right from the trial court's order granting summary disposition in favor of BMJ Engineers & Surveyors, Inc. In a cross appeal, Nature's Way Properties, LLC., appeals as of right from the trial court's order granting partial summary disposition in favor of First State Bank of East Detroit. In both appeals, we affirm.

Nature's Way Properties, LLC., (hereinafter NW), purchased and sought to develop residential lots within a nature preserve located in St. Clair Township. BMJ Engineers &

Surveyors, Inc., (hereinafter BMJ), provided engineering services for the development between 2000 and 2004. The written contract contained an initial flat rate contract price, then provided that additional services would be paid at an hourly rate. When it did not receive payment for services rendered, BMJ filed a construction lien and this lawsuit seeking foreclosure of the lien. BMJ also filed a claim for breach of contract. BMJ named additional parties to the lawsuit based on recorded interests, including Teltow Contracting, Inc., (hereinafter Teltow), and First State Bank of East Detroit (hereinafter FSB).¹

FSB approved a loan to NW in the amount of \$580,000. However, there were insufficient funds remaining to pay BMJ and Teltow. Although the principal payment amount was due in a year, NW requested and received a 120-day extension. FSB rejected NW's request to increase the amount of the loan from \$580,000 to \$695,000. When NW defaulted, FSB filed an affidavit of abandonment to accelerate the process and the time frame for NW's right of redemption. Ultimately, FSB obtained a sheriff's deed to the property. It was undisputed that the construction liens were of higher priority than the interest of FSB.

NW did not dispute the amounts of the construction liens that were owed to BMJ and Teltow and purportedly advised FSB that the claims should be paid. BMJ filed a motion for summary disposition, and NW did not oppose the motion. Rather, FSB opposed the motion, claiming that BMJ waived its right to claim a construction lien in excess of \$12,000. Thus, FSB asserted that the motion should be granted in the amount of \$12,000. The trial court disagreed and granted BMJ's motion for summary disposition for the entire amount of the construction lien. This ruling is the subject of FSB's claim of appeal.

After the lawsuit was commenced by BMJ, counter claims and cross claims were filed. NW filed a cross complaint against FSB asserting, among other things, that it should have paid the claims of BMJ and Teltow, and it improperly claimed that the property was abandoned to accelerate the time frame for redemption. In the cross complaint, it was asserted that FSB interfered with NW's right of redemption. FSB filed a motion for summary disposition of the cross complaint. The trial court partially ruled in favor of NW on this motion, concluding that there were questions of fact regarding some issues and allowed for a one-year period of redemption for NW, but dismissed the cross complaint. The trial court scheduled a trial date to resolve the case. The trial date was scheduled after the right of redemption period expired, and the parties did not object to the trial date or the relief given to the parties in accordance with the ruling on the motion for summary disposition. Despite this partial victory, NW filed a cross appeal with regard to the trial court's ruling on FSB's motion for summary disposition. This ruling is the subject of the cross appeal.

FSB contends that the trial court erred in granting BMJ's motion for summary disposition. We disagree. Summary disposition decisions are reviewed de novo on appeal, viewing the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). The moving party has the initial burden to support its claim

¹ Teltow also filed a construction lien and sought to foreclose on the lien. A settlement with regard to this party was reached in the lower court, and it is not a party to this appeal.

for summary disposition by affidavits, depositions, admissions or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

The question of what constitutes a waiver presents a question of law, and questions of law are reviewed de novo. *MacInnes v MacInnes*, 260 Mich App 280, 283; 677 NW2d 889 (2004). Questions regarding the proper interpretation of a contract or the legal effect of a contractual clause are reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). A contract may be inartfully worded or clumsily arranged, but if it fairly admits of one interpretation, it is not ambiguous. *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997). The burden of proving a waiver is on the owner of the premises. *Marquette Lumber Co v Albee*, 196 Mich 127, 130; 162 NW 1005 (1917). “To be effective, the waiver document should clearly and unequivocally show an express waiver.” *Sturgis Savings & Loan Ass’n v Italian Village, Inc*, 81 Mich App 577, 580; 266 NW2d 755 (1978).

Review of the waiver at issue reveals that it was only a “partial conditional waiver” that waived BMJ’s construction lien “to the amount of \$10,000.”² The waiver document also provided that it did not cover all amounts due and owing to BMJ for contract improvements. Although the document contained a statement of account, there was no certification on the document to indicate that the amounts contained therein were accurate. Furthermore, the contract between BMJ and NW was of a continuing nature. While BMJ’s work was initially set at a flat rate, the contract provided that additional services were to be paid at an hourly rate. There is no indication that this waiver modified the contract between BMJ and NW such that additional balances would not be paid and additional services would not be provided. FSB, as the opposing party, failed to demonstrate a genuine issue of material fact with regard to the waiver. *Quinto, supra*. It had the burden of establishing a clear and unequivocal waiver of all outstanding balances, *Sturgis Savings, supra*, and the plain language of the waiver indicates that it only addressed a \$10,000 check payment received by BMJ.

To prevent the payment of the entire amount of the construction lien, FSB alleges that it detrimentally relied on the waiver document to determine the amount of the loan, and therefore, that BMJ was equitably estopped from denying the content of the waiver document. However, FSB failed to present any documentary evidence from any representative to indicate that the waiver document was relied upon in determining the amount of the loan. *Quinto, supra*.

“Equitable estoppel is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a

² The waiver document at issue is signed only by the principal of BMJ. It is unclear if FSB has standing to challenge the document and when FSB learned of the existence of the document. Nonetheless, we address the merits of the issue as raised by the parties.

particular fact.” *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). “Equitable estoppel may arise where (1) a party, by representations, admissions or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.” *Id.* at 141. A “plaintiff cannot construct a detrimental reliance or estoppel theory on a conditional promise, especially when the condition did not take place.” *Bivans Corp v Community National Bank*, 15 Mich App 178, 182; 166 NW2d 270 (1968). Based on the evidence presented, FSB failed to meet the elements of equitable estoppel. FSB was not entitled to rely on the waiver document to establish a balance of \$12,000. The document provided that the waiver only governed the amount of \$10,000, and indicated that it did not apply to all balances. FSB failed to meet the second requirement for equitable estoppel because it failed to present documentary evidence of reliance. Lastly, there was no evidence of prejudice to FSB because BMJ provided improvements to the property, and as the holder of the sheriff’s deed, FSB received the benefits of those improvements. Review of the waiver document revealed that it contained a conditional promise; that is, it applied to a \$10,000 payment only. FSB cannot rely on the waiver document to avoid the entire amount of the construction lien.

Next, FSB alleges that there was collusion between BMJ and NW. However, we note that FSB fails to cite any authority in support of a collusion theory or the elements of collusion. This Court is not required to search for authority to sustain or reject a position raised by a party without citation to authority. *In re Reisman Estate*, 266 Mich App 522, 533; 702 NW2d 658 (2005). FSB seemingly is alleging a cause of action for fraud. However, “there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant.” *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). If FSB intended on determining the loan amount based on the payments to subcontractors, the best evidence of such payments would be invoices or estimates, not a statement of account contained within a waiver document. Unfortunately, there is no evidence that FSB requested any invoices or estimates from the subcontractors or that the subcontractors, such as BMJ, precluded FSB from examining the invoices. Moreover, irrespective of the statement of account, the waiver document expressly stated that it did not cover all amounts due and owing to BMJ. Consequently, FSB should have inquired about the total amount of invoices due and owing and whether the contract between BMJ and NW was of a continuing nature. In light of these deficiencies by FSB, a claim of equitable estoppel, collusion,³ or fraud cannot be maintained to avoid summary disposition in favor of BMJ.

³ In the challenge based on collusion, FSB allegedly relied on an invoice wherein it was asserted that a balance to complete the project was \$12,235. However, a careful review of the document reveals that \$12,235 was needed to complete the project, but \$11,235 was due and owing. Consequently, \$23,470 would be owed to BMJ upon completion of the additional necessary work. It should be noted that FSB never asserts that BMJ billed NW for services that were not performed. The invoice statement fails to establish that BMJ and NW engaged in collusion.

Next, FSB asserts that the deposition testimony of BMJ's president, Earl DesJardins, established that the information supplied in the partial conditional waiver was false. We disagree. Although DesJardins acknowledged that the information contained in the statement of account did not comport with other financial records that he reviewed,⁴ he opined that the partial conditional waiver was signed in exchange for receipt of a \$10,000 check. This testimony does not contradict, but is consistent with the plain language of the partial conditional waiver. The waiver provided that it applied to \$10,000 only and did not account for all outstanding balances between BMJ and NW. Therefore, FSB's reliance on the deposition testimony of DesJardins is misplaced.

Lastly, FSB contends that the trial court erred in awarding the full amount of the construction lien when the lien was overstated by \$680, and that \$9,523.54 in finance charges were not included in the construction lien. To be preserved for appellate review, an issue must be raised, addressed, and decided in the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). In response to the motion for summary disposition by BMJ, FSB asserted that the waiver precluded payment, in whole or in part, of the construction lien. At that time, FSB never took issue with the amount of the construction lien or the finance charges. Accordingly, this issue is not preserved for appellate review.⁵

In the cross appeal, NW asserts that the trial court erred in granting less than complete relief when it denied the dispositive motion based on genuine issues of material fact and then declared a one-year redemption period. Specifically, NW asserts that, to deny the motion for summary disposition, the trial court implicitly found that the affidavit filed by FSB was false, and therefore, the foreclosure should have been set aside. However, this issue is not preserved for appellate review because it was not raised, addressed, and decided by the trial court. *Miller, supra*.

In the response in opposition to FSB's motion for summary disposition, NW requested that the motion be denied. The trial court denied the motion with regard to FSB's claim for relief and did not allow FSB to assert the right of redemption period for abandoned property,⁶

⁴ The parol evidence rule excludes evidence of prior contemporaneous agreements, oral or written, that contradict, vary, or modify an unambiguous writing intended as a final and complete expression of the agreement. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998). FSB fails to brief why parol evidence should be considered. Nonetheless, we address the deposition testimony.

⁵ We note that at the hearing regarding the motion for entry of order, FSB took issue with the finance charges, asserting that they were not timely claimed when the construction lien was filed. The trial court awarded the finance charges without comment. Irrespective of the time frame of the claim for the finance charges, FSB does not dispute that the finance charges are covered within the terms of BMJ's contract. Thus, even if we deemed this issue preserved at the motion for entry of order stage of the case, we cannot conclude that the trial court erred in its construction of the contract by awarding these finance charges. *Rory, supra*.

⁶ The benefit of abandoned property is that the redemption period is only 30 days. MCL 600.3240(11).

concluding that there were factual issues regarding this issue and a one-year period for redemption was imposed. NW never asserted that it was entitled to have the foreclosure set aside. A party may not harbor error as an appellate parachute by assigning error on appeal to something that counsel deemed proper in the trial court. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

NW's claim that the trial court found fraud to deny the motion for summary disposition is without merit. The trial court merely held that there were factual questions surrounding this issue in light of competing assertions and evidence. It is entirely possible that, upon hearing evidence, the trial court may have concluded that FSB's representative appropriately filed an affidavit of abandonment. More importantly, if NW believed that fraud was present, it should have asked the trial court to accelerate the trial before the expiration of the one-year redemption period to establish that it was entitled to equitable relief that exceeded the trial court's ruling on summary disposition. Indeed, the court rules, MCR 2.116(I)(3), provide for an immediate trial of factual issues. In summary, NW received a beneficial ruling from the trial court and did not ask for further relief. The function of this Court is to act as an error correcting court. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). Accordingly, we cannot conclude that the trial court erred in failing to grant additional relief to NW when it was not requested.

NW next asserts that the trial court erred in granting summary disposition of the cross complaint in favor of FSB. Specifically, NW alleges that it entered into an agreement to extend the loan and took steps in furtherance of the agreement by partial performance. It was also asserted that FSB interfered with redemption rights. Review of the record reveals that NW did not meet its evidentiary burden to oppose the motion for summary disposition. *Maiden, supra*; *Quinto, supra*. The general rule is that a court may compel specific performance of an oral contract for land when a party has partially performed the contract. *Zaborski v Kutyla*, 29 Mich App 604, 607; 185 NW2d 586 (1971). However, review of the affidavit submitted by NW reveals that the parties could not come to terms with a modification of the written agreement. Although the representatives for NW signed off on the agreement, FSB never agreed to the terms and did not sign any modification or new agreement. While the law will operate to imply a contract in order to prevent unjust enrichment, a contract will not be implied where there is an express contract governing the same subject matter. *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). In this case, the affidavit admits to the existence of a written contract and NW's authorization of the contract, but further admits that FSB did not agree to its terms.⁷ Therefore, the trial court did not err in granting dismissal of the cross complaint.

⁷ The affidavit did not address the specifics of how FSB allegedly interfered with NW's redemption rights. Moreover, there is no indication that NW was ready, willing, and able to redeem. Therefore, the dismissal of this count was not error.

Affirmed.

/s/ Patrick M. Meter

/s/ Kirsten Frank Kelly

/s/ Karen M. Fort Hood